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7
8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**
10

11 MICHAEL ZELENY,

12 Plaintiff,

13 vs.

14 GAVIN NEWSOM, *et al.*,

15 Defendants.
16
17
18
19

Case No. CV 17-7357 RS

Assigned to:

The Honorable Richard G. Seeborg

**REPLY IN SUPPORT OF PLAINTIFF'S
MOTION TO MAKE CLARIFYING
AMENDMENT TO SECOND AMENDED
COMPLAINT**

Date: October 29, 2020

Time: 1:30 p.m.

Courtroom 3, 17th Floor

Action Filed: December 28, 2017

Trial Date: [Not Set]

20
21 **I. INTRODUCTION**

22 Defendant Xavier Becerra ("Becerra") provides no basis to deviate from the
23 strong policy of granting amendments with extreme liberality—particularly amendments
24 encompassed within the facts alleged in the existing pleadings. He offers no authority nor any
25 evidence supporting a contrary result. He does not distinguish the myriad of cases cited in the
26 opening brief, showing that (a) a plaintiff is not required to plead his legal theory in the first
27 place; and (b) even if Zeleny were, amendment must be granted absent a showing of prejudice
28 or bad faith. The policy of the Federal Rules is to try cases on their merits, not procedural

1 technicalities.

2 *First*, Becerra fails to cite a single authority for his argument that Zeleny needs
3 leave to add a “new cause of action.” The Federal Rules do not contemplate “causes of action,”
4 but claims. Claims are the facts alleged, not the legal theories attached to them. Becerra cannot
5 dispute that all of the facts supporting Zeleny’s amendment are included in the existing
6 complaint—and have been included since the original complaint.

7 *Second*, Becerra fails to show prejudice from an amendment clarifying Zeleny’s
8 theory. While he now argues that Zeleny’s facial challenge “may” require factual
9 development—directly contrary to the position he has taken repeatedly—he does not identify
10 any new facts or new discovery that would be needed. He does not even bother to submit a
11 declaration of counsel. A party cannot ward off a valid amendment by raising the specter that it
12 “may” require unidentified discovery.

13 To the extent that amendment is needed at all, Becerra has done nothing to
14 overcome the extremely liberal standard in this Circuit.

15 16 **II. ARGUMENT**

17 **A. The Federal Rules Did Away with Code Pleading Decades Ago.**

18 Becerra’s argument that Zeleny is adding a “new cause of action” ignores the
19 Federal Rules. The Federal Rules do not contemplate “causes of action” – *i.e.*, facts tied to a
20 specific legal theory. *N.A.A.C.P. v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 292 (7th Cir. 1992)
21 (Easterbrook, J.) This is a “throwback to code pleading, perhaps all the way back to the forms of
22 action.” *Id.*

23 Causes of action are not required in federal practice, and a plaintiff is not stuck to
24 the theories alleged in his complaint. *See Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 12
25 (2014) (“[t]he federal rules effectively abolish the restrictive theory of the pleadings doctrine,
26 making it clear that it is unnecessary to set out a legal theory”). A plaintiff is not required to
27 “break out all of her legal theories into separate ‘causes’ of action with precise accompanying
28 facts and law.” *Ostrofky v. Sauer*, No. 07-987, 2010 WL 891263, at *4 (E.D. Cal. Mar. 8, 2010).

1 Instead, the Federal Rules require a plaintiff to state “claims” for relief. Fed. R.
 2 Civ. P. 8(a)(2). *See Alvarez v. Hill*, 518 F.3d 1152, 1157 (9th Cir. 2008) (“[n]otice pleading
 3 requires the plaintiff to set forth ... claims for relief, not causes of action”). A claim is an
 4 “aggregate of operative facts which give rise to a right enforceable in the courts.” *Bautista v.*
 5 *Los Angeles County*, 216 F.3d 837, 840 (9th Cir. 2000). “One set of facts producing one injury
 6 creates one claim for relief, no matter how many laws the deeds violate.” *N.A.A.C.P.*, 978 F.3d
 7 at 292. A party can recover on any theory consistent with the facts alleged. *See, e.g., Fanucchi*
 8 *& Limi Farms v. United Agri Prods.*, 414 F.3d 1075, 1082 (9th Cir. 2005) (noting that plaintiff
 9 could prevail on unpled novation theory where facts alleged supported novation). A plaintiff is
 10 “required to do no more” than to state facts entitling him to relief. *Johnson*, 574 U.S. at 12.

11 Becerra does not and cannot argue that the facts underlying Zeleny’s claims are
 12 missing from the complaint. Zeleny brings a facial challenge to the open carry statutes,
 13 including the “authorized participant” exception. He quotes the exact statutory language at
 14 issue. He alleges that there are differing interpretations. He states a constitutional challenge
 15 under the Fourteenth Amendment. Becerra ignores the overwhelming authority, cited in the
 16 moving papers and above, that this is sufficient. Zeleny’s vagueness theory is well within the
 17 scope of the facts alleged.

18 Although no amendment is needed, as in *Johnson*, “[f]or clarification and to ward
 19 off further insistence on a punctiliously stated ‘theory of the pleadings,’” Zeleny should be
 20 allowed to make a clarifying amendment. 574 U.S. at 12.

21 **B. There Was No Bad Faith and Is No Prejudice.**

22 As Becerra concedes, absent prejudice or bad faith, no amount of time delay is
 23 sufficient to deny leave. Opp. at p. 1; *United States v. Webb*, 655 F.2d 977, 980 (9th Cir. 1981).
 24 Becerra has not come close to showing bad faith or prejudice. He fails to submit any evidence
 25 whatsoever.

26 Zeleny seeks amendment in direct response to issues that came out during
 27 discovery. After fighting to avoid discovery into his interpretation and application of the
 28 statutes, Becerra cannot seriously argue that Zeleny is seeking leave in bad faith. It is true that

1 the statutes have not changed since 2012 or 2013. It is also true that over the past two months,
 2 Becerra—whose job it is to understand and enforce them—has made clear that he has no idea
 3 what they mean. Even now, after two orders to do so, he cannot explain how the statutes apply.
 4 *See* Robinson Supp. Decl., Ex. 1 at pp. 24-32. This made the vagueness of the statutes apparent
 5 and naturally prompted Zeleny to revisit his legal arguments.

6 Becerra’s argument that he is prejudiced by a *facial* challenge to the statutes is
 7 disingenuous. He has repeatedly taken the position that a facial challenge is a pure matter of law
 8 and no discovery is needed. *See, e.g.*, Letter Brief dated June 4, 2020, Dkt. No. 127, at p. 4
 9 (“[s]uch a pure legal conclusion is not the proper subject of written or oral discovery”); Letter
 10 Brief dated August 26, 2020, Dkt. No. 135, at p. 5 (“Zeleny’s facial claims ... will involve pure
 11 issues of law. It will not involve any issues of fact, or issues of law applied to fact”). Becerra’s
 12 position—at least until Zeleny filed this motion—was as follows:

13 Discovery may be sought about facts, or about the application of law to facts, but
 14 not about pure questions of law. ***In this facial constitutional challenge, the***
 15 ***meaning of the California Penal Code will involve statutory interpretation***
 16 ***divorced from the facts of the case. Zeleny and the Attorney General will have***
 17 ***equal access to relevant legislative history and other legal resources, and the***
 18 ***Court will determine whether Zeleny is entitled to the judgment that he seeks.***
 19 Discovery about the Attorney General’s legal theories is not permitted and will
 20 improperly infringe on the Attorney General’s mental impression work product.

21 Letter Brief dated August 26, 2020, Dkt. No. 135, at p. 4 (emphasis added).

22 Now, however, Becerra claims that “[w]hile a facial challenge generally involves
 23 questions of law,” a vagueness challenge “may also depend on facts about what conduct a
 24 plaintiff is engaged in, or wants to engage in.” Opp. at p. 3. He cites no authority and identifies
 25 no facts or discovery that he believes he needs. *See United States v. Jess*, No. 05-3964, 2008
 26 WL 480291, at *2 (N.D. Cal. Feb. 19, 2008) (finding no significant prejudice where party
 27 opposing leave did not identify any specific discovery that it needed). The conduct Zeleny
 28 “wants to engage in” is detailed in an exhaustive administrative record.

 The burden was on Becerra to show prejudice. *See DCD Programs, Ltd. v.*
Leighton, 833 F.2d 183, 186 (9th Cir. 1997). He fails to carry it.

1 **III. CONCLUSION**

2 Becerra has failed to show that amendment is required. If it is required, he has
3 failed to show that he would be prejudiced by it. This motion should be granted to avoid any
4 further dispute or confusion.

5 Dated: October 14, 2020

Respectfully submitted,

6 s/ Damion Robinson

7 David W. Affeld

8 Damion D. D. Robinson

9 David Markevitch

Affeld Grivakes LLP

Attorneys for Plaintiff Michael Zeleny

SUPPLEMENTAL DECLARATION OF DAMION ROBINSON

I, Damion Robinson, declare:

1. I and my law firm are counsel of record for plaintiff Michael Zeleny in this action. I have personal knowledge of the facts below.

2. Attached as **Exhibit 1** is a true copy of Defendant Attorney General Xavier Becerra's Amended Responses to Plaintiff Michael Zeleny's First Set of Interrogatories, served October 6, 2020.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 13th day of October, 2020 at Los Angeles, California.

s/ Damion Robinson
Damion D. D. Robinson

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MICHAEL ZELENY, an individual,

Plaintiff,

v.

**GAVIN NEWSOM, an individual, in his
official capacity; XAVIER BECERRA, an
individual, in his official capacity; CITY OF
MENLO PARK, a municipal corporation;
and DAVE BERTINI, in his official
capacity,**

Defendants.

3:17-cv-07357 RS (NC)

**DEFENDANT ATTORNEY GENERAL
XAVIER BECERRA'S AMENDED¹
RESPONSES TO PLAINTIFF MICHAEL
ZELENY'S FIRST SET OF
INTERROGATORIES**

PROPOUNDING PARTY:

Plaintiff Michael Zeleny

ANSWERING PARTY:

Defendant Attorney General Xavier Becerra

SET NUMBER:

One

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¹ On September 4, 2020, the Court ordered Defendant Becerra to amend his responses to Plaintiff Michael Zeleny's interrogatories 10 through 16 and 22 through 25. *See* Dkt. No. 140 (affirmed by Dkt. No. 148).

PRELIMINARY STATEMENT

For purposes of these interrogatories, Plaintiff Zeleny has used the terms “YOU” and “YOUR” to, “refer to Xavier Becerra as the Attorney General of the State of California. These interrogatories seek the official position of the State of California.” (Plaintiff Zeleny’s Interrogatories, p. 2, lines 22-24.) Defendant Becerra objects to Plaintiff Zeleny’s definition of “YOU” and “YOUR” as encompassing the official position of the State of California. The phrase “the official position of the State of California” is vague and overbroad. The State of California is made up of the Executive, Legislative, and Judicial branches of government, which are separate and co-equal. California’s Executive branch includes a number of elected officials including, but not limited to the Attorney General of California. Moreover, the State of California is not a defendant in this action—nor would it be an appropriate defendant in this action. As a general matter, the proper respondent or defendant in a challenge to a state law or policy is the officer or agency charged with implementing it. See *Serrano v. Priest*, 18 Cal.3d 728, 752 (1976); *State v. Superior Court*, 12 Cal.3d 237, 255 (1974).

Defendant Becerra objects to each interrogatory to the extent that it purports to impose any obligation or requirement greater than or different to the obligations or requirements set forth in the Federal Rules of Civil Procedure and/or the applicable rules and orders of this Court.

Defendant Becerra objects to each interrogatory to the extent that it calls for the disclosure of information protected from disclosure by the attorney work-product doctrine, the attorney-client privilege, the deliberative process privilege and/or any other applicable privilege or protection. Should Defendant Becerra disclose any privileged or otherwise protected information in these responses, the disclosure is inadvertent and does not constitute a waiver of the privilege or protection.

Defendant Becerra has not completed the investigation of the facts and issues relating to Plaintiff Zeleny’s claims and has not completed discovery in this action. All of the answers contained herein are based solely upon information and documents which are presently available to, and specifically known by, Defendant Becerra, and the answers disclose only those contentions which presently occur to Defendant Becerra. Further discovery, independent

1 investigation, legal research and analysis may supply additional facts and may lead to additions,
2 changes, and variations from the answers herein.

3 The following answers are given without prejudice to the right to produce evidence and/or
4 witnesses or rely on facts which Defendant Becerra may later discover. Defendant Becerra
5 accordingly reserves the right to change any and all answers herein as additional facts are
6 ascertained, witnesses identified and legal research is completed. The answers contained herein
7 are made in good faith in an attempt to supply as much factual information and as much
8 specification of legal contention as is presently known, and in no way prejudices Defendant
9 Becerra in relation to further discovery and proceedings.

10 Defendant Becerra incorporates by reference every general objection set forth above into
11 each specific answer set forth below. A specific response may repeat a general objection for
12 emphasis or some other reason. The failure to include a general objection in any specific answer
13 does not waive any general objection to that interrogatory.

14 **INTERROGATORY NO. 1:** State all facts on which You base Your contention, if any,
15 that California Penal Code § 26350 is constitutional under the Second Amendment, including any
16 legitimate goals or public interests intended to be served by that statute.

17 [As used in these interrogatories,

18 (a) “You” and “Your” refer to Xavier Becerra as the Attorney General of the State of
19 California. These interrogatories seek the official position of the State of California;

20 (b) “Second Amendment” means the Second Amendment to the United States
21 Constitution].

22 **RESPONSE TO INTERROGATORY NO. 1:**

23 Defendant Becerra incorporates by reference the above-stated general objections as though
24 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is
25 vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to
26 Plaintiff Zeleny’s claims, and not reasonably calculated to lead to the discovery of information
27 that is relevant to Plaintiff’s claims. Defendant Becerra also objects to this interrogatory on the
28 grounds that it seeks Defendant Becerra’s contentions regarding the constitutionality of California

1 Penal Code § 26350, and thus poses a question of pure law. Defendant Becerra is not required to
 2 respond to interrogatories raising questions of pure law. See *AngioScore, Inc. v. TriReme Med.,*
 3 *Inc.*, No. 12-cv-03393-YGR (JSC), 2014 WL 7188779, at *5 (N.D. Cal. Dec. 16, 2014)
 4 (“[I]nterrogatories directed to issues of ‘pure law’—i.e., abstract legal issues not dependent on the
 5 facts of the case are not permitted”) (citation and some internal punctuation omitted). A party
 6 responding to interrogatories “is not required to write his[, her, or its] brief on a motion for
 7 summary judgment in his[, her, or its] responses to interrogatories.” *Larson v. Trans Union, LLC*,
 8 No. 3:12-CV-05726-WHO, 2017 WL 1540710, at *1 (N.D. Cal. April 28, 2017) (citation and
 9 some internal punctuation omitted).

10 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as
 11 follows: California Penal Code § 26350 is constitutional under the Second Amendment.

12 In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the United States Supreme Court
 13 recognized that the Second Amendment protects an individual right to keep and bear arms. 554
 14 U.S. at 636. The *Heller* Court did not, however, “undertake an exhaustive historical analysis . . .
 15 of the full scope of the Second Amendment” or attempt to “clarify the entire field.” *Id.* at 626,
 16 635.

17 First, *Heller* explains that “the most natural reading of ‘keep Arms’” is “to ‘have
 18 weapons,’” 554 U.S. at 582, and that “bear arms” is most naturally read to mean “‘wear, bear, or
 19 carry upon the person or in clothing or in a pocket, for the purpose of being armed and ready for
 20 offensive or defensive action in a case of conflict with another person,’” *id.* at 584 (ellipses
 21 omitted).

22 Second, the right to bear arms must be construed and applied with careful attention to its
 23 “historical background.” *Heller*, 554 U.S. at 592; see *id.* At 576-626. This is critical “because it
 24 has always been widely understood that the Second Amendment, like the First and Fourth
 25 Amendments, codified a *pre-existing* right,” and “declares only that is ‘shall not be infringed.’”
 26 *Id.*, at 592. Thus, while the Second Amendment’s inclusion in the Bill of Rights indicates that the
 27 right to bear arms ranks as fundamental, nothing about its enumeration in the Constitution
 28

1 changed the right into anything more comprehensive or absolute than would have been
2 understood and expected by “ordinary citizens in the founding generation.” *Id.* at 577.

3 Third, that commonly understood right was and is “not unlimited.” *Heller*, 554 U.S. at 595,
4 626. It is not a right “to keep and carry any weapon whatsoever in any manner whatsoever and
5 for whatever purpose,” *id.* at 626, or “to carry arms for any sort of confrontation,” *id.* at 595. The
6 core individual right recognized by *Heller* is the right to keep and bear arms “in defense of hearth
7 and home.” 554 U.S. at 635; see also *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010)
8 (plurality op.) (*Heller*’s “central holding” was that “the Second Amendment protects a personal
9 right to keep and bear arms for lawful purposes, most notably for self-defense within the home.”).
10 That does not mean that the right to “bear” has no scope or application beyond the home or its
11 immediate environs. But nothing in *Heller* suggests that it applies in exactly the same in all
12 places, so that a restriction on bearing arms in public must be treated just like a restriction on
13 bearing in or around the home. In particular, nothing in *Heller* dictates that, as Plaintiff Zeleny
14 seems to contend, that the Second Amendment embodies an individual right to openly carry a gun
15 in almost any public place.

16 On the contrary, *Heller* makes clear that Second Amendment rights are subject to many
17 reasonable regulations. See 554 U.S. at 636. Indeed, the Second Amendment “by no means
18 eliminates” States’ “ability to devise solutions to social problems that suit local needs and
19 values.” *McDonald*, 561 U.S. at 785.

20 *Heller* does not recognize any unfettered right to carry firearms in the crowded urban areas,
21 based solely on an individual’s stated desire to be ““armed and ready for offensive or defensive
22 action in case of conflict with another person,”” 554 U.S. at 584. Rather, under *Heller*, Plaintiff
23 Zeleny’s challenge to Penal Code § 26350 must be evaluated, in the first instance, by examining
24 “the historical understanding of the scope of that right.” *Id.* at 625. The challenge cannot succeed
25 if the State’s restrictions are a type of reasonable public regulation that has long been considered
26 consistent with a private right to bear arms. *Cf. id.* at 626-627.

27 “No fundamental right—not even the First Amendment—is absolute.” *McDonald*, 561
28 U.S. at 802 (Scalia, J., concurring). Just as the First Amendment does not confer a right to speak

1 in any time, place or manner, history and precedent teach that the Second Amendment does not
 2 confer the right to carry guns anywhere or at any time. See *Heller*, 554 U.S. at 595. California’s
 3 laws regulating the public carrying of firearms strike a permissible balance between preserving
 4 order and public safety and accommodating the desire of some residents to carry guns. There are
 5 consistent with traditional restrictions on public carry, and are presumptively lawful on that basis.

6 Where text, history, and tradition show that a challenged law is consistent with the Second
 7 Amendment, the restriction “passes constitutional muster” and the court’s inquiry “is
 8 complete.” *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 682 (9th Cir. 2017) (en banc); see *Heller*,
 9 554 U.S. at 626, 627 n.26.

10 California broadly allows the carrying of firearms in places and circumstances where it has
 11 traditionally been common: in or immediately around an individual’s home or place of business
 12 and on much other private property with permission; in less-populated areas and during activities
 13 such as hunting; and in circumstances of immediate and grave danger to person or property when
 14 law enforcement is not available. It also allows qualified individuals to obtain licenses to carry
 15 more generally, if they can establish “good cause” under standards set by local officials who are
 16 most familiar with the needs and desires of their own communities.

17 However, there is an “historical prevalence” of public carry restrictions similar to Penal
 18 Code § 26350. *Kachalsky v. Cty of Westchester*, 701 F.3d 81, 96 (2nd Cir. 2012). Because
 19 “[f]irearms have always been more heavily regulated in the public sphere,” the right to bear arms
 20 “most certainly operates in a different manner” in that context than when evaluating restrictions
 21 that impinge directly on the core right to keep and carry guns in the home. *Drake v. Filko*, 724
 22 F.3d 426, 430 n.5. (3rd Cir. 2013).

23 This makes good functional sense. When individuals move outside their homes—and
 24 particularly when they move about in populated areas—their interest in carrying a firearm is
 25 much more likely to come into conflict with the public interest in order and safety. See, e.g.,
 26 *Gould v. Morgan*, 907 F.3d 659, 672, (1st Cir. 2018). The “inherent” risk that firearms present
 27 when carried in public “distinguishes the Second Amendment right from other fundamental rights
 28 . . . such as the right to marry and the right to be free from viewpoint discrimination, which can be

1 exercised without creating a direct risk to others. *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121,
 2 1126 (10th Cir. 2015). And as the Fourth Circuit observed, it “is not far-fetched to think” that
 3 Heller’s focus on the “core” right to protect the home was born out of a recognition that the
 4 danger of “tragic act[s]” of violence “would rise exponentially as one moved the right from the
 5 home to the public square.” *United States v. Masciandaro*, 638 F.3d 458, 475-476 (4th Cir. 2011)
 6 (Wilkinson, J.).

7 There is a legitimate role for public regulation touching on even our most fundamental
 8 rights—especially when there is or can be genuine tension between the exercise of individual
 9 rights and the safety of members of the public and law enforcement officers.

10 When, as here, a court will review a challenged statute under intermediate scrutiny, courts
 11 ask whether the law promotes a “significant, substantial, or important government objective,” and
 12 whether there is a “‘reasonable fit’ between the challenged law and the asserted objective.” *Peña*
 13 *v. Lindley*, 898 F.3d 969, 979 (9th Cir. 2018). While the State must show that the law “promotes
 14 a substantial government interest that would be achieved less effectively absent the regulation,” it
 15 need not demonstrate that the regulation is the “least restrictive means of achieving the
 16 government interest.” *Id.* (citations and quotation marks omitted). A court’s only obligation is to
 17 “assure that, in formulating its judgments, [the State] has drawn reasonable inferences based on
 18 substantial evidence,” an inquiry that must accord “‘substantial deference to the predictive
 19 judgments’” of the legislature. *Id.* at 979-980 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S.
 20 180, 195 (1997)).

21 The need for appropriate deference to legislative predications is especially clear in the
 22 Second Amendment context. “Providing for the safety of citizens within their borders has long
 23 been state government’s most basic task.” *Kolbe v. Hogan*, 849 F.3d 114, 150 (4th Cir. 2017)
 24 (Wilkinson, J., concurring). State legislatures are “‘far better equipped than the judiciary’ to
 25 make sensitive public policy judgments (within constitutional limits) concerning the dangers in
 26 carrying firearms and the manner to combat those risks.” *Kachalsky*, 701 F.3d at 97. And, while
 27 a legislature’s judgments can be based on empirical evidence, they need not be; “history,
 28 consensus, and ‘simple common sense’” will suffice. *Florida Bar v. Went for It, Inc.*, 515 U.S.

1 618, 628 (1995). Indeed, when it comes to dealing with a complex societal problem like gun
2 violence, there will almost always be room for reasonable minds to differ about the optimal
3 solution; demanding undue certainly would be foolhardy.

4 Here, California has a compelling interest in protecting public safety and reducing gun
5 violence. *Jackson v. City & County of San Francisco*, 746 F.3d 953, 965 (9th Cir. 2014). An
6 increase in guns carried by private persons in public places increases the risk that ““basic
7 confrontations between individuals [will] turn deadly.” *Wollard v. Gallagher*, 712 F.3d 865, 879
8 (4th Cir. 2013). Similarly, misfired shots or accidental discharges are “more likely to hit a
9 bystander where there are more bystanders to hit.” Blocher, *Firearm Localism*, 123 Yale L.J. 82,
10 122-123 (2013). The Legislature could also conclude that widespread public carry increases the
11 “availability of handguns to criminals via theft,” *Woollard*, 712 F.3d at 879, and that such guns
12 would then be used to “commit violent crimes” or be transferred to “others who commit crimes,”
13 U.S. Dep’t of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *2012 Summary:*
14 *Firearms Reported Lost and Stolen 2* (2013).

15 According to the legislative history of California Penal Code § 26350, the absence of a
16 prohibition on openly carrying unloaded firearms has created a surge in individuals openly
17 carrying unloaded firearms in public. These incidents adversely affect public safety in several
18 ways. Members of the public who encounter individuals openly carrying firearms are alarmed
19 and fearful for their safety and the safety of others. When members of the public report such
20 incidents to local law enforcement, they are only able to provide law enforcement personnel with
21 incomplete information. As a result, law enforcement agencies respond to such incidents with
22 limited information regarding whether the individual openly carrying the firearm is a danger to
23 himself or herself; a danger to the public; or a danger to the responding law enforcement
24 personnel.

25 In such situations, a wrong move by the individual carrying the firearm could be construed
26 as threatening by the responding law enforcement officer. The officer may feel compelled to
27 respond in a manner that could result in injury or death. Thus, the practice of openly carrying
28 unloaded firearms can create an unsafe environment for everyone involved: the individual

1 carrying the firearm, the responding law enforcement personnel, and all other individuals who
2 may be nearby.

3 In addition, responding to incidents involving individuals openly carrying unloaded
4 firearms taxes the resources of law enforcement agencies already stretched by under-staffing and
5 budget cutbacks. Such a diversion of resources adversely affects law enforcement agencies'
6 ability to provide other public safety services to their communities. See e.g., *Woollard*, 712 F.3d
7 at 879-880 (recounting similar policing benefits).

8 In light of the public safety risks the Legislature could reasonably deem to be associated
9 with public carrying of firearms, there is a "reasonable fit" between California's calibrated
10 regime governing public carry and the important interests that it serves. *Peña*, 898 F.3d at 979.

11 **INTERROGATORY NO. 2:** Identify all documents bearing upon, supporting, or
12 reflecting the facts set forth in Your response to the preceding interrogatory.

13 **RESPONSE TO INTERROGATORY NO. 2:**

14 Defendant Becerra incorporates by reference the above-stated general objections as though
15 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is
16 vague, overbroad, and/or unduly burdensome. Moreover, it seeks information irrelevant to
17 Plaintiff Zeleny's claims, and not reasonably calculated to lead to the discovery of information
18 that is relevant to Plaintiff's claims.

19 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as
20 follows: See DOJ 000127-DOJ000411; DOJ 000001-DOJ 000126; DOJ 001227-DOJ 001281.

21 **INTERROGATORY NO. 3:** State all facts on which You base Your contention, if any,
22 that California Penal Code § 26400 is constitutional under the Second Amendment, including any
23 legitimate goals or public interests intended to be served by the statute.

24 **RESPONSE TO INTERROGATORY NO. 3:**

25 Defendant Becerra incorporates by reference the above-stated general objections as though
26 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is
27 vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to
28 Plaintiff Zeleny's claims, and not reasonably calculated to lead to the discovery of information

that is relevant to Plaintiff's claims. Defendant Becerra also objects to this interrogatory on the grounds that it seeks Defendant Becerra's contentions regarding the constitutionality of California Penal Code § 26400, and thus poses a question of pure law. Defendant Becerra is not required to respond to interrogatories raising questions of pure law. See *AngioScore, Inc. v. TriReme Med., Inc.*, No. 12-cv-03393-YGR (JSC), 2014 WL 7188779, at *5 (N.D. Cal. Dec. 16, 2014) ("[I]nterrogatories directed to issues of 'pure law'—i.e., abstract legal issues not dependent on the facts of the case are not permitted") (citation and some internal punctuation omitted). A party responding to interrogatories "is not required to write his[, her, or its] brief on a motion for summary judgment in his[, her, or its] responses to interrogatories." *Larson v. Trans Union, LLC*, No. 3:12-CV-05726-WHO, 2017 WL 1540710, at *1 (N.D. Cal. April 28, 2017) (citation and some internal punctuation omitted).

Subject to, and without waiving the foregoing objections, Defendant Becerra responds as follows: California Penal Code § 26400 is constitutional under the Second Amendment.

In *Heller*, the Supreme Court recognized that the Second Amendment protects an individual right to keep and bear arms. 554 U.S. at 636. The *Heller* Court did not, however, "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment" or attempt to "clarify the entire field." *Id.* at 626, 635.

First, *Heller* explains that "the most natural reading of 'keep Arms'" is "to 'have weapons,'" 554 U.S. at 582, and that "bear arms" is most naturally read to mean "'wear, bear, or carry upon the person or in clothing or in a pocket, for the purpose of being armed and ready for offensive or defensive action in a case of conflict with another person,'" *id.* at 584 (ellipses omitted).

Second, the right to bear arms must be construed and applied with careful attention to its "historical background." *Heller*, 554 U.S. at 592; see *id.* At 576-626. This is critical "because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right," and "declares only that is 'shall not be infringed.'" *Id.*, at 592. Thus, while the Second Amendment's inclusion in the Bill of Rights indicates that the right to bear arms ranks as fundamental, nothing about its enumeration in the Constitution

1 changed the right into anything more comprehensive or absolute than would have been
 2 understood and expected by “ordinary citizens in the founding generation.” *Id.* at 577.

3 Third, that commonly understood right was and is “not unlimited.” *Heller*, 554 U.S. at 595,
 4 626. It is not a right “to keep and carry any weapon whatsoever in any manner whatsoever and
 5 for whatever purpose,” *id.* at 626, or “to carry arms for any sort of confrontation,” *id.* at 595. The
 6 core individual right recognized by *Heller* is the right to keep and bear arms “in defense of hearth
 7 and home.” 554 U.S. at 635; see also *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010)
 8 (plurality op.) (*Heller*’s “central holding” was that “the Second Amendment protects a personal
 9 right to keep and bear arms for lawful purposes, most notably for self-defense within the home.”).
 10 That does not mean that the right to “bear” has no scope or application beyond the home or its
 11 immediate environs. But nothing in *Heller* suggests that it applies in exactly the same in all
 12 places, so that a restriction on bearing arms in public must be treated just like a restriction on
 13 bearing in or around the home. In particular, nothing in *Heller* dictates that, as Plaintiff Zeleny
 14 seems to contend, that the Second Amendment embodies an individual right to openly carry a gun
 15 in almost any public place.

16 On the contrary, *Heller* makes clear that Second Amendment rights are subject to many
 17 reasonable regulations. See 554 U.S. at 636. Indeed, the Second Amendment “by no means
 18 eliminates” States’ “ability to devise solutions to social problems that suit local needs and
 19 values.” *McDonald*, 561 U.S. at 785.

20 *Heller* does not recognize any unfettered right to carry firearms in the crowded urban areas,
 21 based solely on an individual’s stated desire to be “‘armed and ready for offensive or defensive
 22 action in case of conflict with another person,’” 554 U.S. at 584. Rather, under *Heller*, Plaintiff
 23 Zeleny’s challenge to Penal Code § 26350 must be evaluated, in the first instance, by examining
 24 “the historical understanding of the scope of that right.” *Id.* at 625. The challenge cannot succeed
 25 if the State’s restrictions are a type of reasonable public regulation that has long been considered
 26 consistent with a private right to bear arms. *Cf. id.* at 626-627.

27 “No fundamental right—not even the First Amendment—is absolute.” *McDonald*, 561
 28 U.S. at 802 (Scalia, J., concurring). Just as the First Amendment does not confer a right to speak

1 in any time, place or manner, history and precedent teach that the Second Amendment does not
2 confer the right to carry guns anywhere or at any time. See *Heller*, 554 U.S. at 595. California’s
3 laws regulating the public carrying of firearms strike a permissible balance between preserving
4 order and public safety and accommodating the desire of some residents to carry guns. There are
5 consistent with traditional restrictions on public carry, and are presumptively lawful on that basis.

6 Where text, history, and tradition show that a challenged law is consistent with the Second
7 Amendment, the restriction ““passes constitutional muster”” and the court’s inquiry ““is
8 complete.”” *Teixeira*, 873 F.3d at 682; see *Heller*, 554 U.S. at 626, 627 n.26.

9 California broadly allows the carrying of firearms in places and circumstances where it has
10 traditionally been common: in or immediately around an individual’s home or place of business
11 and on much other private property with permission; in less-populated areas and during activities
12 such as hunting; and in circumstances of immediate and grave danger to person or property when
13 law enforcement is not available. It also allows qualified individuals to obtain licenses to carry
14 more generally, if they can establish “good cause” under standards set by local officials who are
15 most familiar with the needs and desires of their own communities.

16 However, there is an “historical prevalence” of public carry restrictions similar to Penal
17 Code § 26400. *Kachalsky*, 701 F.3d at 96. Because “[f]irearms have always been more heavily
18 regulated in the public sphere,” the right to bear arms “most certainly operates in a different
19 manner” in that context than when evaluating restrictions that impinge directly on the core right
20 to keep and carry guns in the home. *Drake*, 724 F.3d at 430 n.5.

21 This makes good functional sense. When individuals move outside their homes—and
22 particularly when they move about in populated areas—their interest in carrying a firearm is
23 much more likely to come into conflict with the public interest in order and safety. See, e.g.,
24 *Gould v. Morgan*, 907 F.3d 659, 672, (1st Cir. 2018). The “inherent” risk that firearms present
25 when carried in public “distinguishes the Second Amendment right from other fundamental rights
26 . . . such as the right to marry and the right to be free from viewpoint discrimination, which can be
27 exercised without creating a direct risk to others. *Bonidy*, 790 F.3d at 1126. And as the Fourth
28 Circuit observed, it “is not far-fetched to think” that *Heller*’s focus on the “core” right to protect

1 the home was born out of a recognition that the danger of “tragic act[s]” of violence “would rise
 2 exponentially as one moved the right from the home to the public square.” *Masciandaro*, 638
 3 F.3d at 475-476.

4 There is a legitimate role for public regulation touching on even our most fundamental
 5 rights—especially when there is or can be genuine tension between the exercise of individual
 6 rights and the safety of members of the public and law enforcement officers.

7 When, as here, a court will review a challenged statute under intermediate scrutiny, courts
 8 ask whether the law promotes a “significant, substantial, or important government objective,” and
 9 whether there is a “‘reasonable fit’ between the challenged law and the asserted objective.” *Peña*,
 10 898 F.3d at 979. While the State must show that the law “promotes a substantial government
 11 interest that would be achieved less effectively absent the regulation,” it need not demonstrate
 12 that the regulation is the “least restrictive means of achieving the government interest.” *Id.*
 13 (citations and quotation marks omitted). A court’s only obligation is to “assure that, in
 14 formulating its judgments, [the State] has drawn reasonable inferences based on substantial
 15 evidence,” an inquiry that must accord “‘substantial deference to the predictive judgments’” of
 16 the legislature. *Id.* at 979-980 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195
 17 (1997)).

18 The need for appropriate deference to legislative predications is especially clear in the
 19 Second Amendment context. “Providing for the safety of citizens within their borders has long
 20 been state government’s most basic task.” *Kolbe*, 849 F.3d at 150. State legislatures are “‘far
 21 better equipped than the judiciary’ to make sensitive public policy judgments (within
 22 constitutional limits) concerning the dangers in carrying firearms and the manner to combat those
 23 risks.” *Kachalsky*, 701 F.3d at 97. And, while a legislature’s judgments can be based on
 24 empirical evidence, they need not be; “history, consensus, and ‘simple common sense’” will
 25 suffice. *Went for It, Inc.*, 515 U.S. at 628. Indeed, when it comes to dealing with a complex
 26 societal problem like gun violence, there will almost always be room for reasonable minds to
 27 differ about the optimal solution; demanding undue certainly would be foolhardy.

28 / / /

1 California has a compelling interest in protecting public safety and reducing gun violence.
 2 *Jackson*, 746 F.3d at 965. An increase in guns carried by private persons in public places
 3 increases the risk that ““basic confrontations between individuals [will] turn deadly.” *Wollard*,
 4 712 F.3d at 879. Similarly, misfired shots or accidental discharges are “more likely to hit a
 5 bystander where there are more bystanders to hit.” Blocher, *Firearm Localism*, 123 Yale L.J. 82,
 6 122-123 (2013). The Legislature could also conclude that widespread public carry increases the
 7 “availability of handguns to criminals via theft,” *Woollard*, 712 F.3d at 879, and that such guns
 8 would then be used to “commit violent crimes” or be transferred to “others who commit crimes,”
 9 U.S. Dep’t of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *2012 Summary:*
 10 *Firearms Reported Lost and Stolen 2* (2013).

11 The absence of a prohibition on openly carrying unloaded firearms has created a surge in
 12 individuals openly carrying unloaded firearms in public. These incidents adversely affect public
 13 safety in several ways. Members of the public who encounter individuals openly carrying
 14 firearms are alarmed and fearful for their safety and the safety of others. When members of the
 15 public report such incidents to local law enforcement, they are only able to provide law
 16 enforcement personnel with incomplete information. As a result, law enforcement agencies
 17 respond to such incidents with limited information regarding whether the individual openly
 18 carrying the firearm is a danger to himself or herself; a danger to the public; or a danger to the
 19 responding law enforcement personnel.

20 In such situations, a wrong move by the individual carrying the firearm could be construed
 21 as threatening by the responding law enforcement officer. The officer may feel compelled to
 22 respond in a manner that could result in injury or death. Thus, the practice of openly carrying
 23 unloaded firearms can create an unsafe environment for everyone involved: the individual
 24 carrying the firearm, the responding law enforcement personnel, and all other individuals who
 25 may be nearby.

26 In addition, responding to incidents involving individuals openly carrying unloaded
 27 firearms taxes the resources of law enforcement agencies already stretched by under-staffing and
 28 budget cutbacks. Such a diversion of resources adversely affects law enforcement agencies’

ability to provide other public safety services to their communities. See e.g., *Woollard*, 712 F.3d at 879-880 (recounting similar policing benefits).

According to the legislative history of California Penal Code § 26400, one of the purposes of the bill (A.B. 1527) was to follow up A.B. 144 (Statutes of 2011), which made public open carry of handguns a misdemeanor, by expanding the prohibition to long-guns in incorporated cities. “The absence of a prohibition on ‘open carry’ of long guns has created an increase in problematic instances of these guns carried in public, alarming unsuspecting individuals causing issues for law enforcement. Open carry creates a potentially dangerous situation. In most cases when a person is openly carrying a firearm, law enforcement is called to the scene with few details other than one or more people are present at a location and are armed.” (See DOJ 001050) “In these tense situations, the slightest wrong move by the gun-carrier could be construed as threatening by the responding officer, who may feel compelled to respond in a manner that could be lethal. In this situation the practice of ‘open carry’ creates an unsafe environment for all parties involved; the officer, the gun-carrying individual, and for any other individuals nearby as well.” (See DOJ 001050)

“Additionally, the increase in ‘open-carry’ calls placed to law enforcement has taxed departments dealing with under-staffing and cutbacks due to the current fiscal climate in California, preventing them from protecting the public in other ways.” (See DOJ 001051)

In light of the public safety risks the Legislature could reasonably deem to be associated with public carrying of firearms, there is a “‘reasonable fit’” between California’s calibrated regime governing public carry and the important interests that it serves. *Peña*, 898 F.3d at 979.

INTERROGATORY NO. 4: Identify all documents bearing upon, supporting, or reflecting the facts set forth in Your response to the preceding interrogatory.

RESPONSE TO INTERROGATORY NO. 4:

Defendant Becerra incorporates by reference the above-stated general objections as though fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to

1 Plaintiff Zeleny's claims, and not reasonably calculated to lead to the discovery of information
2 that is relevant to Plaintiff's claims.

3 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as
4 follows: See DOJ 000127-DOJ 000411; DOJ 000412-DOJ 000529; DOJ 000927-DOJ 001226;
5 DOJ 001227-DOJ 001281.

6 **INTERROGATORY NO. 5:** State all reasons for the adoption of California Penal Code
7 §§ 26375 and 26405(r), including, but not limited to any legitimate goals or public interests
8 intended to be served by the exemptions contained therein.

9 **RESPONSE TO INTERROGATORY NO. 5:**

10 Defendant Becerra incorporates by reference the above-stated general objections as though
11 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is
12 vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to
13 Plaintiff Zeleny's claims, and not reasonably calculated to lead to the discovery of information
14 that is relevant to Plaintiff's claims. Defendant Becerra also objects to this interrogatory on the
15 grounds that it seeks Defendant Becerra's contentions regarding the constitutionality of California
16 Penal Code §§ 26375 and 26405(r), and thus poses questions of pure law. Defendant Becerra is
17 not required to respond to interrogatories raising questions of pure law. See *AngioScore, Inc. v.*
18 *TriReme Med., Inc.*, No. 12-cv-03393-YGR (JSC), 2014 WL 7188779, at *5 (N.D. Cal. Dec. 16,
19 2014) ("[I]nterrogatories directed to issues of 'pure law'—i.e., abstract legal issues not dependent
20 on the facts of the case are not permitted") (citation and some internal punctuation omitted). A
21 party responding to interrogatories "is not required to write his[, her, or its] brief on a motion for
22 summary judgment in his[, her, or its] responses to interrogatories." *Larson v. Trans Union, LLC*,
23 No. 3:12-CV-05726-WHO, 2017 WL 1540710, at *1 (N.D. Cal. April 28, 2017) (citation and
24 some internal punctuation omitted).

25 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as
26 follows: The *Heller* Court recognized that the Second Amendment protects an individual right to
27 keep and bear arms. 554 U.S. at 636. The Court did not, however, "undertake an exhaustive
28

1 historical analysis . . . of the full scope of the Second Amendment” or attempt to “clarify the
2 entire field.” *Id.* at 626, 635.

3 First, *Heller* explains that “the most natural reading of ‘keep Arms’” is “to ‘have
4 weapons,’” 554 U.S. at 582, and that “bear arms” is most naturally read to mean “‘wear, bear, or
5 carry upon the person or in clothing or in a pocket, for the purpose of being armed and ready for
6 offensive or defensive action in a case of conflict with another person,’” *id.* at 584 (ellipses
7 omitted).

8 Second, the right to bear arms must be construed and applied with careful attention to its
9 “historical background.” *Heller*, 554 U.S. at 592; see *id.* At 576-626. This is critical “because it
10 has always been widely understood that the Second Amendment, like the First and Fourth
11 Amendments, codified a *pre-existing* right,” and “declares only that is ‘shall not be infringed.’”
12 *Id.*, at 592. Thus, while the Second Amendment’s inclusion in the Bill of Rights indicates that the
13 right to bear arms ranks as fundamental, nothing about its enumeration in the Constitution
14 changed the right into anything more comprehensive or absolute than would have been
15 understood and expected by “ordinary citizens in the founding generation.” *Id.* at 577.

16 Third, that commonly understood right was and is “not unlimited.” *Heller*, 554 U.S. at 595,
17 626. It is not a right “to keep and carry any weapon whatsoever in any manner whatsoever and
18 for whatever purpose,” *id.* at 626, or “to carry arms for any sort of confrontation,” *id.* at 595. The
19 core individual right recognized by *Heller* is the right to keep and bear arms “in defense of hearth
20 and home.” 554 U.S. at 635; see also *McDonald*, 561 U.S. at 780 (*Heller*’s “central holding” was
21 that “the Second Amendment protects a personal right to keep and bear arms for lawful purposes,
22 most notably for self-defense within the home.”). That does not mean that the right to “bear” has
23 no scope or application beyond the home or its immediate environs. But nothing in *Heller*
24 suggests that it applies in exactly the same in all places, so that a restriction on bearing arms in
25 public must be treated just like a restriction on bearing in or around the home.

26 On the contrary, *Heller* makes clear that Second Amendment rights are subject to many
27 reasonable regulations. See 554 U.S. at 636. Indeed, the Second Amendment “by no means
28

eliminates” States’ “ability to devise solutions to social problems that suit local needs and values.” *McDonald*, 561 U.S. at 785.

Heller does not recognize any unfettered right to carry firearms in the crowded urban areas, based solely on an individual’s stated desire to be “‘armed and ready for offensive or defensive action in case of conflict with another person,’” 554 U.S. at 584. Rather, under *Heller*, a challenge to Penal Code § 26350 must be evaluated, in the first instance, by examining “the historical understanding of the scope of that right.” *Id.* at 625. The challenge cannot succeed if the State’s restrictions are a type of reasonable public regulation that has long been considered consistent with a private right to bear arms. *Cf. id.* at 626-627.

“No fundamental right—not even the First Amendment—is absolute.” *McDonald*, 561 U.S. at 802 (Scalia, J., concurring). Just as the First Amendment does not confer a right to speak in any time, place or manner, history and precedent teach that the Second Amendment does not confer the right to carry guns anywhere or at any time. See *Heller*, 554 U.S. at 595. California’s laws regulating the public carrying of firearms strike a permissible balance between preserving order and public safety and accommodating the desire of some residents to carry guns. There are consistent with traditional restrictions on public carry, and are presumptively lawful on that basis.

Where text, history, and tradition show that a challenged law is consistent with the Second Amendment, the restriction “‘passes constitutional muster’” and the court’s inquiry “‘is complete.’” *Teixeira*, 873 F.3d at 682; see *Heller*, 554 U.S. at 626, 627 n.26.

California broadly allows the carrying of firearms in places and circumstances where it has traditionally been common: in or immediately around an individual’s home or place of business and on much other private property with permission; in less-populated areas and during activities such as hunting; and in circumstances of immediate and grave danger to person or property when law enforcement is not available. It also allows qualified individuals to obtain licenses to carry more generally, if they can establish “good cause” under standards set by local officials who are most familiar with the needs and desires of their own communities.

However, there is an “historical prevalence” of public carry restrictions similar to those in California. *Kachalsky*, 701 F.3d at 96. Because “[f]irearms have always been more heavily

1 regulated in the public sphere,” the right to bear arms “most certainly operates in a different
2 manner” in that context than when evaluating restrictions that impinge directly on the core right
3 to keep and carry guns in the home. *Drake*, 724 F.3d at 430 n.5.

4 This makes good functional sense. When individuals move outside their homes—and
5 particularly when they move about in populated areas —their interest in carrying a firearm is
6 much more likely to come into conflict with the public interest in order and safety. *See, e.g.,*
7 *Gould*, 907 F.3d at 672. The “inherent” risk that firearms present when carried in public
8 “distinguishes the Second Amendment right from other fundamental rights . . . such as the right to
9 marry and the right to be free from viewpoint discrimination, which can be exercised without
10 creating a direct risk to others. *Bonidy*, 790 F.3d at 1126. And as the Fourth Circuit observed, it
11 “is not far-fetched to think” that *Heller*’s focus on the “core” right to protect the home was born
12 out of a recognition that the danger of “tragic act[s]” of violence “would rise exponentially as one
13 moved the right from the home to the public square.” *Masciandaro*, 638 F.3d at 475-476.

14 There is a legitimate role for public regulation touching on even our most fundamental
15 rights—especially when there is or can be genuine tension between the exercise of individual
16 rights and the safety of members of the public and law enforcement officers.

17 When, as here, a court will review a challenged statute under intermediate scrutiny, courts
18 ask whether the law promotes a “significant, substantial, or important government objective,” and
19 whether there is a “‘reasonable fit’ between the challenged law and the asserted objective.” *Peña*,
20 898 F.3d at 979. While the State must show that the law “promotes a substantial government
21 interest that would be achieved less effectively absent the regulation,” it need not demonstrate
22 that the regulation is the “least restrictive means of achieving the government interest.” *Id.*
23 (citations and quotation marks omitted). A court’s only obligation is to “assure that, in
24 formulating its judgments, [the State] has drawn reasonable inferences based on substantial
25 evidence,” an inquiry that must accord “‘substantial deference to the predictive judgments’” of
26 the legislature. *Id.* at 979-980 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195
27 (1997)).
28

1 The need for appropriate deference to legislative predications is especially clear in the
 2 Second Amendment context. “Providing for the safety of citizens within their borders has long
 3 been state government’s most basic task.” *Kolbe*, 849 F.3d at 150. State legislatures are ““far
 4 better equipped than the judiciary’ to make sensitive public policy judgments (within
 5 constitutional limits) concerning the dangers in carrying firearms and the manner to combat those
 6 risks.” *Kachalsky*, 701 F.3d at 97. And, while a legislature’s judgments can be based on
 7 empirical evidence, they need not be; “history, consensus, and ‘simple common sense’” will
 8 suffice. *Went for It, Inc.*, 515 U.S. at 628.

9 California has a compelling interest in protecting public safety and reducing gun violence.
 10 *Jackson*, 746 F.3d at 965. An increase in guns carried by private persons in public places
 11 increases the risk that ““basic confrontations between individuals [will] turn deadly.” *Wollard*,
 12 712 F.3d at 879. Similarly, misfired shots or accidental discharges are “more likely to hit a
 13 bystander where there are more bystanders to hit.” Blocher, *Firearm Localism*, 123 Yale L.J. 82,
 14 122-123 (2013). The Legislature could also conclude that widespread public carry increases the
 15 “availability of handguns to criminals via theft,” *Woollard*, 712 F.3d at 879, and that such guns
 16 would then be used to “commit violent crimes” or be transferred to “others who commit crimes,”
 17 U.S. Dep’t of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, *2012 Summary:*
 18 *Firearms Reported Lost and Stolen 2* (2013).

19 The absence of a prohibition on openly carrying unloaded firearms has created a surge in
 20 individuals openly carrying unloaded firearms in public. These incidents adversely affect public
 21 safety in several ways. Members of the public who encounter individuals openly carrying
 22 firearms are alarmed and fearful for their safety and the safety of others. When members of the
 23 public report such incidents to local law enforcement, they are only able to provide law
 24 enforcement personnel with incomplete information. As a result, law enforcement agencies
 25 respond to such incidents with limited information regarding whether the individual openly
 26 carrying the firearm is a danger to himself or herself; a danger to the public; or a danger to the
 27 responding law enforcement personnel.
 28

1 In such situations, a wrong move by the individual carrying the firearm could be construed
2 as threatening by the responding law enforcement officer. The officer may feel compelled to
3 respond in a manner that could result in injury or death. Thus, the practice of openly carrying
4 unloaded firearms can create an unsafe environment for everyone involved: the individual
5 carrying the firearm, the responding law enforcement personnel, and all other individuals who
6 may be nearby.

7 In addition, responding to incidents involving individuals openly carrying unloaded
8 firearms taxes the resources of law enforcement agencies already stretched by under-staffing and
9 budget cutbacks. Such a diversion of resources adversely affects law enforcement agencies'
10 ability to provide other public safety services to their communities. *See e.g., Woollard*, 712 F.3d
11 at 879-880 (recounting similar policing benefits).

12 According to the legislative history of California Penal Code § 26400, one of the purposes
13 of the bill (A.B. 1527) was to follow up A.B. 144 (Statutes of 2011), which made public open
14 carry of handguns a misdemeanor, by expanding the prohibition to long-guns in incorporated
15 cities. "The absence of a prohibition on 'open carry' of long guns has created an increase in
16 problematic instances of these guns carried in public, alarming unsuspecting individuals causing
17 issues for law enforcement. Open carry creates a potentially dangerous situation. In most cases
18 when a person is openly carrying a firearm, law enforcement is called to the scene with few
19 details other than one or more people are present at a location and are armed." (See DOJ 001050)
20 "In these tense situations, the slightest wrong move by the gun-carrier could be construed as
21 threatening by the responding officer, who may feel compelled to respond in a manner that could
22 be lethal. In this situation the practice of 'open carry' creates an unsafe environment for all
23 parties involved; the officer, the gun-carrying individual, and for any other individuals nearby as
24 well." (See DOJ 001050)

25 "Additionally, the increase in 'open-carry' calls placed to law enforcement has taxed
26 departments dealing with under-staffing and cutbacks due to the current fiscal climate in
27 California, preventing them from protecting the public in other ways." (See DOJ 001051)
28

1 Here, the Legislature enacted certain exceptions to the general prohibitions on openly
2 carrying firearms.

3 Penal Code § 26375 provides that section 26350 does not apply to, or affect, the open
4 carrying of an unloaded handgun by an authorized participant in, or an authorized employee or
5 agent of a supplier of firearms for, a motion picture, television or video production, or
6 entertainment event, when the participant lawfully uses the handgun as part of that production or
7 event, as part of rehearsing or practicing for participation in that production or event, or while the
8 participant or authorized employee or agent is at that production or event, or rehearsal or practice
9 for that production or event. (Pen. Code, § 26375.) According to the Legislative history, Penal
10 Code § 26375 permits the use of unloaded handguns as an “entertainment props.” (See DOJ
11 000219)

12 Likewise, Penal Code § 26405, subdivision (r) provides that Penal Code § 26400 does not
13 apply to, or affect, the carrying of an unloaded firearm that is not a handgun by an authorized
14 participant in, or an authorized employee or agent of a supplier of firearms for, a motion picture,
15 television, or video production or entertainment event, when the participant lawfully uses that
16 firearm as part of that production or event, as part of rehearsing or practicing for participation in
17 that production or event, or while the participant or authorized employee or agent is at that
18 production or event, or rehearsal or practice for that production or event.

19 And, Penal Code § 29500 provides that, “Any person who is at least 21 years of age may
20 apply for an entertainment firearms permit from the Department of Justice. An entertainment
21 firearms permit authorizes the permit holder to possess firearms loaned to the permitholder for
22 use solely as a prop in a motion picture, television, video, theatrical, or other entertainment
23 production or event.” (Added by Stats.2010, c. 711 (S.B. 1080).)

24 **INTERROGATORY NO. 6:** Identify all documents bearing upon, supporting, or
25 reflecting the reasons set forth in Your response to the preceding interrogatory.

26 **RESPONSE TO INTERROGATORY NO. 6:**

27 Defendant Becerra incorporates by reference the above-stated general objections as though
28 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is

1 vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to
 2 Plaintiff Zeleny's claims, and not reasonably calculated to lead to the discovery of information
 3 that is relevant to Plaintiff's claims.

4 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as
 5 follows: See DOJ 000127-DOJ 000411; DOJ 000749-DOJ 000926; DOJ 0001282-DOJ 001312.

6 **INTERROGATORY NO. 7:** State all factors that You contend were considered by the
 7 Legislature of the State of California in determining whether or not to exempt the use of firearms
 8 in other forms of expressive activity from the statutes prohibiting the carrying of firearms in
 9 public.

10 **RESPONSE TO INTERROGATORY NO. 7:**

11 Defendant Becerra incorporates by reference the above-stated general objections as though
 12 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is
 13 vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to
 14 Plaintiff Zeleny's claims, and not reasonably calculated to lead to the discovery of information
 15 that is relevant to Plaintiff's claims.

16 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as
 17 follows: Defendant Becerra has not made the contention described in this interrogatory.

18 **INTERROGATORY NO. 8:** State all reasons for distinguishing between "motion picture,
 19 television or video production, or entertainment event[s]" and other forms of speech or
 20 expressive conduct in California Penal Code §§ 26375 and 26405(r).

21 **RESPONSE TO INTERROGATORY NO. 8:**

22 Defendant Becerra incorporates by reference the above-stated general objections as though
 23 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is
 24 vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to
 25 Plaintiff Zeleny's claims, and not reasonably calculated to lead to the discovery of information
 26 that is relevant to Plaintiff's claims.

27 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as
 28 follows: The interrogatory call for Defendant Becerra to speculate regarding whether the

1 Legislature considered including other forms of “speech or expressive conduct” in enacting Penal
 2 Code §§ 26375 and 26405, subdivision (r). Thus, Defendant Becerra is unable to respond to this
 3 interrogatory.

4 **INTERROGATORY NO. 9:** Identify all documents bearing upon, supporting, or
 5 reflecting the reasons set forth in Your response to the preceding interrogatory.

6 **RESPONSE TO INTERROGATORY NO. 9:**

7 Defendant Becerra incorporates by reference the above-stated general objections as though
 8 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is
 9 vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to
 10 Plaintiff Zeleny’s claims, and not reasonably calculated to lead to the discovery of information
 11 that is relevant to Plaintiff’s claims.

12 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as
 13 follows: N/A.

14 **INTERROGATORY NO. 10:** Does the phrase “authorized participant” as used in
 15 California Penal Code §§ 26375 and 26405(r) refer to a participant authorized by a governmental
 16 body or agency?

17 **INITIAL RESPONSE TO INTERROGATORY NO. 10:**

18 Defendant Becerra incorporates by reference the above-stated general objections as though
 19 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is
 20 vague and overbroad. Moreover, it seeks information irrelevant to Plaintiff Zeleny’s claims, and
 21 not reasonably calculated to lead to the discovery of information that is relevant to Plaintiff’s
 22 claims.

23 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as
 24 follows: Penal Code §§ 26375 and 26405, subdivision (r) do not include definitions of the phrase
 25 “authorized participant.”

26 However, according to the Legislative history of Penal Code § 26375, that section permits
 27 the use of unloaded handguns as an “entertainment props.” (See DOJ 000219) Additionally, the
 28 Entertainment Firearms Permit only authorizes the permit holder “to possess firearms loaned to

the permitholder for use solely as a prop in a motion picture, television, video, theatrical, or other entertainment production or event.” (Penal Code § 29500.) Thus, the exceptions set forth in Penal Code §§ 26375 and 26405, subdivision (r) are available only to those using unloaded firearms loaned to them for use as “entertainment props” in a motion picture, television, video, theatrical, or other entertainment production or event.

AMENDED RESPONSE TO INTERROGATORY NO. 10:

Defendant Becerra incorporates by reference the above-stated general objections as though fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is vague and overbroad. Moreover, it seeks information irrelevant to Plaintiff Zeleny’s claims, and not reasonably calculated to lead to the discovery of information that is relevant to Plaintiff’s claims.

Subject to, and without waiving the foregoing objections, Defendant Becerra responds as follows: Penal Code §§ 26375 and 26405, subdivision (r) do not include definitions of the phrase “authorized participant.” Defendant Becerra has never issued a formal opinion under California law regarding the meaning of the phrase “authorized participant,” and this response is not such an opinion and cannot be relied upon as such an opinion. Nor is this response a generally applicable rule or regulation that is intended to be applied outside of the context of this case. Moreover, Defendant Becerra played no material role in the events described in the complaint, and was not involved in the denial of Plaintiff Michael Zeleny’s permit application(s).

Based on Defendant Becerra’s understanding of Plaintiff Zeleny’s situation, in the specific context of this case, Defendant Becerra believes that most plausible reading of the term “authorized participant” as used in California Penal Code §§ 26375 and 26405(r) refers to a participant authorized by a governmental body or agency.

INTERROGATORY NO. 11: If Your answer to Interrogatory No. 10 is in the affirmative, identify the governmental bodies or agencies from which authorization is required?

INITIAL RESPONSE TO INTERROGATORY NO. 11:

Defendant Becerra incorporates by reference the above-stated general objections as though fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is

1 vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to
 2 Plaintiff Zeleny's claims, and not reasonably calculated to lead to the discovery of information
 3 that is relevant to Plaintiff's claims.

4 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as
 5 follows: N/A.

6 **AMENDED RESPONSE TO INTERROGATORY NO. 11:**

7 Defendant Becerra incorporates by reference the above-stated general objections as though
 8 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is
 9 vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to
 10 Plaintiff Zeleny's claims, and not reasonably calculated to lead to the discovery of information
 11 that is relevant to Plaintiff's claims.

12 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as
 13 follows: Penal Code §§ 26375 and 26405, subdivision (r) do not include definitions of the phrase
 14 "authorized participant." Defendant Becerra has never issued a formal opinion under California
 15 law regarding the meaning of the phrase "authorized participant," and this response is not such an
 16 opinion and cannot be relied upon as such an opinion. Nor is this response a generally applicable
 17 rule or regulation that is intended to be applied outside of the context of this case. Moreover,
 18 Defendant Becerra played no material role in the events described in the complaint, and was not
 19 involved in the denial of Plaintiff Michael Zeleny's permit application(s).

20 Based on Defendant Becerra's understanding of Plaintiff Zeleny's situation, in the specific
 21 context of this case, the Department of Justice's Entertainment Firearms Permit only authorizes
 22 the permit holder "to possess firearms loaned to the permitholder for use solely as a prop in a
 23 motion picture, television, video, theatrical, or other entertainment production or event." (Penal
 24 Code § 29500.) Anyone who is not otherwise authorized to carry a weapon openly, but who
 25 desires to carry a weapon openly "as a prop in a motion picture, television, video, theatrical, or
 26 other entertainment production or event" would need to do so under the auspices of an
 27 Entertainment Firearms Permit.
 28

1 The Attorney General understands this exception to have been carried forward into the open
2 carry laws, as the legislative history of Penal Code § 26375 refers to the use of unloaded
3 handguns as an “entertainment props.” (See DOJ 000219.) Thus, the exceptions set forth in
4 Penal Code §§ 26375 and 26405, subdivision (r) are available only to those using unloaded
5 firearms loaned to them for use as “entertainment props” in a motion picture, television, video,
6 theatrical, or other entertainment production or event.

7 While the Department of Justice “authorizes” the use of firearms in this narrow context
8 through the issuance of Firearms Entertainment Permits, such authorization is in the nature of a
9 defense to an open carry prosecution within the very narrow context of an entertainment prop, not
10 a preclusion of any other regulation by other agencies. Other law enforcement agencies would
11 not be precluded from ensuring that an individual carrying a weapon openly had a permit, or
12 ensuring that an identified individual is not violating any other federal, state, or local laws or
13 ordinances. Notably, when issuing the Firearms Entertainment Permit, the Department does not
14 verify the nature of the entertainment event or impose any restrictions on how a weapon might be
15 carried or used, but only looks to see if a person is prohibited from owning firearms. In this
16 sense, the Firearms Entertainment Permit is a floor rather than a ceiling, with possible room for
17 other law enforcement agencies to determine, for example, that the open carry of weapons
18 endangered public safety, or was a nuisance, or that someone’s conduct was not a “production or
19 event” covered by the relevant exception, or that someone was not violating other laws.

20 Also, within the structure of the open carry laws, the exception for an authorized participant
21 appears to be analogous to similar exceptions for gun shows (Pen. Code § 26369) or target ranges
22 (Pen. Code § 26365)—defined spaces in which the weapon being carried is not easily visible or
23 accessible to the public. The Attorney General understands the Firearms Entertainment Permit,
24 and the corresponding exceptions to the open carry laws, to apply to confined, non-public spaces
25 for a limited period of time, i.e., in a movie studio or clearly defined production area. To the
26 extent that an individual like Mr. Zeleny seeks to demonstrate on a public street with an unloaded
27 firearm in an unconfined area and/or for an indefinite period of time, the Attorney General views
28 the open carrying of unloaded weapons on a public street, in an unconfined area fully visible to

1 and accessible by anyone else, and not within what would reasonably be considered a defined,
 2 enclosed production area, to potentially be conduct outside the scope of the Firearms
 3 Entertainment Permit and the corresponding exception to the open carry laws, and potentially
 4 subject to enforcement by the law enforcement agency primarily responsible for enforcing the
 5 open carry laws in that area.

6 **INTERROGATORY NO. 12:** If Your answer to Interrogatory No. 10 is in the
 7 affirmative, state all bases for your contention that the phrase “authorized participant,” as used in
 8 California Penal Code §§ 26375 and 26405(r), refers to a participant authorized by a
 9 governmental body or agency?

10 **INITIAL RESPONSE TO INTERROGATORY NO. 12:**

11 Defendant Becerra incorporates by reference the above-stated general objections as though
 12 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is
 13 vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to
 14 Plaintiff Zeleny’s claims, and not reasonably calculated to lead to the discovery of information
 15 that is relevant to Plaintiff’s claims.

16 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as
 17 follows: N/A.

18 **AMENDED RESPONSE TO INTERROGATORY NO. 12:**

19 Penal Code §§ 26375 and 26405, subdivision (r) do not include definitions of the phrase
 20 “authorized participant.” Defendant Becerra has never issued a formal opinion under California
 21 law regarding the meaning of the phrase “authorized participant,” and this response is not such an
 22 opinion and cannot be relied upon as such an opinion. Nor is this response a generally applicable
 23 rule or regulation that is intended to be applied outside of the context of this case. Moreover,
 24 Defendant Becerra played no material role in the events described in the complaint, and was not
 25 involved in the denial of Plaintiff Michael Zeleny’s permit application(s).

26 Based on Defendant Becerra’s understanding of Plaintiff Zeleny’s situation, in the specific
 27 context of this case, Defendant Becerra believes that most plausible reading of the term
 28 “authorized participant” as used in California Penal Code §§ 26375 and 26405(r) refers to a

1 participant authorized by a governmental body or agency. The opposite reading is less plausible.
 2 In the broader context of California law, and especially in the context of the Penal Code, it would
 3 be anomalous for an individual to be able to exempt themselves from the reach of a penal statute
 4 by “authorizing” an exception for themselves.

5 **INTERROGATORY NO. 13:** If your answer to Interrogatory No. 10 is in the negative,
 6 state the persons or entities whose authorization is required in order for California Penal Code §§
 7 26375 and 26405(r) to exempt the carrying of firearms from California Penal Code §§ 26350 and
 8 26405.

9 **INITIAL RESPONSE TO INTERROGATORY NO. 13:**

10 Defendant Becerra incorporates by reference the above-stated general objections as though
 11 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is
 12 vague and overbroad. Moreover, it seeks information irrelevant to Plaintiff Zeleny’s claims, and
 13 not reasonably calculated to lead to the discovery of information that is relevant to Plaintiff’s
 14 claims.

15 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as
 16 follows: The Legislature enacted certain exceptions to the general prohibitions on openly carrying
 17 firearms.

18 Penal Code § 26375 provides that section 26350 does not apply to, or affect, the open
 19 carrying of an unloaded handgun by an authorized participant in, or an authorized employee or
 20 agent of a supplier of firearms for, a motion picture, television or video production, or
 21 entertainment event, when the participant lawfully uses the handgun as part of that production or
 22 event, as part of rehearsing or practicing for participation in that production or event, or while the
 23 participant or authorized employee or agent is at that production or event, or rehearsal or practice
 24 for that production or event. (Pen. Code, § 26375.) According to the Legislative history, Penal
 25 Code § 26375 permits the use of unloaded handguns as an “entertainment props.” (See DOJ
 26 000219)

27 Likewise, Penal Code § 26405, subdivision (r) provides that Penal Code § 26400 does not
 28 apply to, or affect, the carrying of an unloaded firearm that is not a handgun by an authorized

1 participant in, or an authorized employee or agent of a supplier of firearms for, a motion picture,
 2 television, or video production or entertainment event, when the participant lawfully uses that
 3 firearm as part of that production or event, as part of rehearsing or practicing for participation in
 4 that production or event, or while the participant or authorized employee or agent is at that
 5 production or event, or rehearsal or practice for that production or event.

6 And, Penal Code § 29500 provides that, “Any person who is at least 21 years of age may
 7 apply for an entertainment firearms permit from the Department of Justice. An entertainment
 8 firearms permit authorizes the permit holder to possess firearms loaned to the permit holder for
 9 use solely as a prop in a motion picture, television, video, theatrical, or other entertainment
 10 production or event.” (Added by Stats.2010, c. 711 (S.B. 1080).)

11 **AMENDED RESPONSE TO INTERROGATORY NO. 13:**

12 No amendment is needed because Defendant Becerra’s answer to interrogatory 10 was not
 13 in the negative.

14 **INTERROGATORY NO. 14:** Do California Penal Codes §§ 26375 and 26405(r) require
 15 that the “motion picture, television or video production” or “entertainment event” itself be
 16 authorized in order to exempt participants from California Penal Code §§ 26350 and 26405?

17 **INITIAL RESPONSE TO INTERROGATORY NO. 14:**

18 Defendant Becerra incorporates by reference the above-stated general objections as though
 19 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is
 20 vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to
 21 Plaintiff Zeleny’s claims, and not reasonably calculated to lead to the discovery of information
 22 that is relevant to Plaintiff’s claims.

23 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as
 24 follows: Penal Code §§ 26375 and 26405(r) do not address whether the “motion picture,
 25 television or video production” or “entertainment event” itself be authorized in order to exempt
 26 participants from California Penal Code §§ 26350 and 26405. Accordingly, Defendant Becerra is
 27 unable to respond to this interrogatory.

AMENDED RESPONSE TO INTERROGATORY NO. 14:

Defendant Becerra incorporates by reference the above-stated general objections as though fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to Plaintiff Zeleny's claims, and not reasonably calculated to lead to the discovery of information that is relevant to Plaintiff's claims.

Subject to, and without waiving the foregoing objections, Defendant Becerra responds as follows: Penal Code §§ 26375 and 26405, subdivision (r) do not include definitions of the phrase "authorized participant." Defendant Becerra has never issued a formal opinion under California law regarding the meaning of the phrase "authorized participant," and this response is not such an opinion and cannot be relied upon as such an opinion. Nor is this response a generally applicable rule or regulation that is intended to be applied outside of the context of this case. Moreover, Defendant Becerra played no material role in the events described in the complaint, and was not involved in the denial of Plaintiff Michael Zeleny's permit application(s).

Based on Defendant Becerra's understanding of Plaintiff Zeleny's situation, in the specific context of this case, Penal Code §§ 26375 and 26405(r) do not address whether the "motion picture, television or video production" or "entertainment event" itself be "authorized" in order to exempt participants from California Penal Code §§ 26350 and 26405. The term "authorized" only clearly modifies the terms "participant," "employee" or "agent." And since Mr. Zeleny himself appears to be the "participant" possessing the weapon(s), it appears to be irrelevant if his "production" or "event" is separately authorized. As Defendant Becerra understands the facts, the question might be different if Mr. Zeleny were not the person openly carrying weapons, but were only the person responsible for a "production" or "event."

Whether or not the "motion picture, television or video production" or "entertainment event" itself must be "authorized" also appears to be a separate question from whether there exists a bona fide "production" or "event" to begin with. Again specifically in the context of this case, within the structure of the open carry laws, the relevant exception appears to be analogous to similar exceptions for gun shows (Pen. Code § 26369) or target ranges (Pen. Code § 26365)—

1 defined spaces in which the weapon being carried is not easily visible or accessible to the public.
 2 The Attorney General understands the Firearms Entertainment Permit, and the corresponding
 3 exceptions to the open carry laws, to apply to confined, non-public spaces for a limited period of
 4 time, i.e., in a movie studio or clearly defined production area. To the extent that an individual
 5 like Mr. Zeleny seeks to demonstrate on a public street with an unloaded firearm in an unconfined
 6 area and/or for an indefinite period of time, the Attorney General views the open carrying of
 7 unloaded weapons on a public street, in an unconfined area fully visible to and accessible by
 8 anyone else, and not within what would reasonably be considered a defined, enclosed production
 9 area (i.e., a production or event), to potentially be conduct outside the scope of the Firearms
 10 Entertainment Permit and the corresponding exception to the open carry laws, and potentially
 11 subject to enforcement by the law enforcement agency primarily responsible for enforcing the
 12 open carry laws in that area.

13 While the Department of Justice “authorizes” the use of firearms in this narrow context
 14 through the issuance of Firearms Entertainment Permits, such authorization is in the nature of a
 15 defense to an open carry prosecution within the very narrow context of an entertainment prop, not
 16 a preclusion of any other regulation by other agencies. Other law enforcement agencies would
 17 not be precluded from ensuring that an individual carrying a weapon openly had a permit, or
 18 ensuring that an identified individual is not violating any other federal, state, or local laws or
 19 ordinances. Notably, when issuing the Firearms Entertainment Permit, the Department does not
 20 verify the nature of the entertainment event or impose any restrictions on how a weapon might be
 21 carried or used, but only looks to see if a person is prohibited from owning firearms. In this
 22 sense, the Firearms Entertainment Permit is a floor rather than a ceiling, with possible room for
 23 other law enforcement agencies to determine, for example, that the open carry of weapons
 24 endangered public safety, or was a nuisance, or that someone’s conduct was not a “production or
 25 event” covered by the relevant exception, or that someone was not violating other laws.

26 **INTERROGATORY NO. 15:** If your response to Interrogatory No. 14 is in the
 27 affirmative, identify all persons or entities whose authorization of the “motion picture, television
 28

1 or video production” or “entertainment event” is required in order to exempt participants from
 2 California Penal Code §§ 26350 and 26405.

3 **INITIAL RESPONSE TO INTERROGATORY NO. 15:**

4 Defendant Becerra incorporates by reference the above-stated general objections as though
 5 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is
 6 vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to
 7 Plaintiff Zeleny’s claims, and not reasonably calculated to lead to the discovery of information
 8 that is relevant to Plaintiff’s claims.

9 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as
 10 follows: N/A.

11 **AMENDED RESPONSE TO INTERROGATORY NO. 15:**

12 Defendant Becerra’s answer to interrogatory 14 was not in the affirmative.

13 **INTERROGATORY NO. 16:** State all of the bases for Your response to Interrogatory
 14 No. 14.

15 **INITIAL RESPONSE TO INTERROGATORY NO. 16:**

16 Defendant Becerra incorporates by reference the above-stated general objections as though
 17 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is
 18 vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to
 19 Plaintiff Zeleny’s claims, and not reasonably calculated to lead to the discovery of information
 20 that is relevant to Plaintiff’s claims.

21 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as
 22 follows: N/A.

23 **AMENDED RESPONSE TO INTERROGATORY NO. 16:**

24 Defendant Becerra has never issued a formal opinion under California law regarding the
 25 meaning of the phrase “authorized participant,” and this response is not such an opinion and
 26 cannot be relied upon as such an opinion. Nor is this response a generally applicable rule or
 27 regulation that is intended to be applied outside of the context of this case. Moreover, Defendant
 28

1 Becerra played no material role in the events described in the complaint, and was not involved in
2 the denial of Plaintiff Michael Zeleny's permit application(s).

3 Based on Defendant Becerra's understanding of Plaintiff Zeleny's situation, in the specific
4 context of this case, Penal Code §§ 26375 and 26405(r) do not address whether the "motion
5 picture, television or video production" or "entertainment event" itself be "authorized" in order to
6 exempt participants from California Penal Code §§ 26350 and 26405. The term "authorized"
7 only clearly modifies the terms "participant," "employee" or "agent." And since Mr. Zeleny
8 himself appears to be the "participant" possessing the weapon(s), it appears to be irrelevant if his
9 "production" or "event" is separately authorized. As Defendant Becerra understands the facts, the
10 question might be different if Mr. Zeleny were not the person openly carrying weapons, but were
11 only the person responsible for a "production" or "event."

12 Whether or not the "motion picture, television or video production" or "entertainment
13 event" itself must be "authorized" also appears to be a separate question from whether there exists
14 a bona fide "production" or "event" to begin with. Again specifically in the context of this case,
15 within the structure of the open carry laws, the relevant exception appears to be analogous to
16 similar exceptions for gun shows (Pen. Code § 26369) or target ranges (Pen. Code § 26365)—
17 defined spaces in which the weapon being carried is not easily visible or accessible to the public.
18 The Attorney General understands the Firearms Entertainment Permit, and the corresponding
19 exceptions to the open carry laws, to apply to confined, non-public spaces for a limited period of
20 time, i.e., in a movie studio or clearly defined production area. To the extent that an individual
21 like Mr. Zeleny seeks to demonstrate on a public street with an unloaded firearm in an unconfined
22 area and/or for an indefinite period of time, the Attorney General views the open carrying of
23 unloaded weapons on a public street, in an unconfined area fully visible to and accessible by
24 anyone else, and not within what would reasonably be considered a defined, enclosed production
25 area (i.e., a production or event), to potentially be conduct outside the scope of the Firearms
26 Entertainment Permit and the corresponding exception to the open carry laws, and potentially
27 subject to enforcement by the law enforcement agency primarily responsible for enforcing the
28 open carry laws in that area.

1 This conclusion is consistent with the legislative history of the open carry statutes. The
2 absence of a prohibition on openly carrying unloaded firearms has created a surge in individuals
3 openly carrying unloaded firearms in public. These incidents adversely affect public safety in
4 several ways. Members of the public who encounter individuals openly carrying firearms are
5 alarmed and fearful for their safety and the safety of others. When members of the public report
6 such incidents to local law enforcement, they are only able to provide law enforcement personnel
7 with incomplete information. As a result, law enforcement agencies respond to such incidents
8 with limited information regarding whether the individual openly carrying the firearm is a danger
9 to himself or herself; a danger to the public; or a danger to the responding law enforcement
10 personnel.

11 In such situations, a wrong move by the individual carrying the firearm could be construed
12 as threatening by the responding law enforcement officer. The officer may feel compelled to
13 respond in a manner that could result in injury or death. Thus, the practice of openly carrying
14 unloaded firearms can create an unsafe environment for everyone involved: the individual
15 carrying the firearm, the responding law enforcement personnel, and all other individuals who
16 may be nearby.

17 In addition, responding to incidents involving individuals openly carrying unloaded
18 firearms taxes the resources of law enforcement agencies already stretched by under-staffing and
19 budget cutbacks. Such a diversion of resources adversely affects law enforcement agencies'
20 ability to provide other public safety services to their communities. *See e.g., Woollard*, 712 F.3d
21 at 879-880 (recounting similar policing benefits).

22 According to the legislative history of California Penal Code § 26400, one of the purposes
23 of the bill (A.B. 1527) was to follow up A.B. 144 (Statutes of 2011), which made public open
24 carry of handguns a misdemeanor, by expanding the prohibition to long-guns in incorporated
25 cities. "The absence of a prohibition on 'open carry' of long guns has created an increase in
26 problematic instances of these guns carried in public, alarming unsuspecting individuals causing
27 issues for law enforcement. Open carry creates a potentially dangerous situation. In most cases
28 when a person is openly carrying a firearm, law enforcement is called to the scene with few

1 details other than one or more people are present at a location and are armed.” (See DOJ 001050)
 2 “In these tense situations, the slightest wrong move by the gun-carrier could be construed as
 3 threatening by the responding officer, who may feel compelled to respond in a manner that could
 4 be lethal. In this situation the practice of ‘open carry’ creates an unsafe environment for all
 5 parties involved; the officer, the gun-carrying individual, and for any other individuals nearby as
 6 well.” (See DOJ 001050)

7 “Additionally, the increase in ‘open-carry’ calls placed to law enforcement has taxed
 8 departments dealing with under-staffing and cutbacks due to the current fiscal climate in
 9 California, preventing them from protecting the public in other ways.” (See DOJ 001051)

10 The opposite legal interpretation is less plausible. If anyone could create a “motion picture,
 11 television or video production” or “entertainment event” merely by filming themselves in a public
 12 place (using an object as small as a cell phone), with no meaningful limitation on the visibility or
 13 timing of the firearms display, such an exception would swallow the general prohibition on open
 14 carrying of weapons and be inconsistent with the California Legislature’s intent to minimize
 15 potentially dangerous interactions in public.

16 **INTERROGATORY NO. 17:** State all facts supporting your interpretation of California
 17 Penal Code §§ 26375 and 26405(r).

18 **RESPONSE TO INTERROGATORY NO. 17:**

19 Defendant Becerra incorporates by reference the above-stated general objections as though
 20 fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is
 21 vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to
 22 Plaintiff Zeleny’s claims, and not reasonably calculated to lead to the discovery of information
 23 that is relevant to Plaintiff’s claims.

24 Subject to, and without waiving the foregoing objections, Defendant Becerra responds as
 25 follows: Defendant Becerra has not issued an interpretation of California Penal Code §§ 26375
 26 and 26405, subdivision (r). However, the California Department of Justice does possess
 27 documents that are related to firearms generally. See and DOJ 0001282-DOJ 001312.
 28

INTERROGATORY NO. 18: Describe in detail all means through which your interpretation of California Penal Code §§ 26375 and 26405(r) has been relayed to municipalities and local governments.

RESPONSE TO INTERROGATORY NO. 18:

Defendant Becerra incorporates by reference the above-stated general objections as though fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to Plaintiff Zeleny's claims, and not reasonably calculated to lead to the discovery of information that is relevant to Plaintiff's claims.

Subject to, and without waiving the foregoing objections, Defendant Becerra responds as follows: Defendant Becerra has not issued an interpretation of California Penal Code §§ 26375 and 26405(r). However, the California Department of Justice does possess documents that are related to firearms generally. See and DOJ 0001282-DOJ 001312.

INTERROGATORY NO. 19: Identify all documents reflecting your interpretation of California Penal Code §§ 26375 and 26405(r).

RESPONSE TO INTERROGATORY NO. 19:

Defendant Becerra incorporates by reference the above-stated general objections as though fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to Plaintiff Zeleny's claims, and not reasonably calculated to lead to the discovery of information that is relevant to Plaintiff's claims.

Subject to, and without waiving the foregoing objections, Defendant Becerra responds as follows: Defendant Becerra has not issued an interpretation of California Penal Code §§ 26375 and 26405(r). Thus, Defendant Becerra is not aware of any documents that would be responsive to this request. However, the California Department of Justice does possess documents that are related to firearms generally. See and DOJ 0001282-DOJ 001312.

INTERROGATORY NO. 20: Identify all documents reflecting that you have conveyed your interpretation of California Penal Code §§ 26375 and 26405(r).

RESPONSE TO INTERROGATORY NO. 20:

Defendant Becerra incorporates by reference the above-stated general objections as though fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to Plaintiff Zeleny's claims, and not reasonably calculated to lead to the discovery of information that is relevant to Plaintiff's claims.

Subject to, and without waiving the foregoing objections, Defendant Becerra responds as follows: Defendant Becerra has not issued an interpretation of California Penal Code §§ 26375 and 26405(r). Thus, Defendant Becerra is not aware of any documents that would be responsive to this request. However, the California Department of Justice does possess documents that are related to firearms generally. See and DOJ 0001282-DOJ 001312.

INTERROGATORY NO. 21: Identify the types of events that qualify as "entertainment events" under California Penal Code §§ 26375, 26405(r), and 25510.

RESPONSE TO INTERROGATORY NO. 21:

Defendant Becerra incorporates by reference the above-stated general objections, as though fully set forth herein. Defendant Becerra objects to this interrogatory on the grounds that it is vague and overbroad, and unduly burdensome. Moreover, it seeks information irrelevant to Plaintiff Zeleny's claims, and not reasonably calculated to lead to the discovery of information that is relevant to Plaintiff's claims.

Subject to, and without waiving the foregoing objections, Defendant Becerra responds as follows: Defendant Becerra has not issued an interpretation of the types of events that would qualify as "entertainment events" under California Penal Code §§ 26375, 26405, subdivision (r), and 25510. Thus, Defendant Becerra is not aware of any documents that would be responsive to this request. However, the California Department of Justice does possess documents that are related to firearms generally. See and DOJ 0001282-DOJ 001312.

1 Dated: October 6, 2020

Respectfully submitted,

2 XAVIER BECERRA
Attorney General of California
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6 */s/ John W. Killeen*
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DECLARATION OF SERVICE BY E-MAIL and OVERNIGHT COURIER

Case Name: **Zeleny, Michael v. Edmund G. Brown, et al.**
No.: **3:17-cv-07357 RS (NC)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for overnight mail with the **GOLDEN STATE OVERNIGHT COURIER SERVICE**. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the overnight courier that same day in the ordinary course of business.

On October 6, 2020, I served the attached **DEFENDANT ATTORNEY GENERAL XAVIER BECERRA'S AMENDED RESPONSES TO PLAINTIFF MICHAEL ZELNY'S FIRST SET OF INTERROGATORIES** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery, addressed as follows:

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and Dave Bertini*

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on October 6, 2020, at Sacramento, California.

Tracie L. Campbell
Declarant


Signature

PROOF OF SERVICE

I hereby certify that on October 14, 2020, I electronically filed the foregoing document using the Court's CM/ECF system. I am informed and believe that the CM/ECF system will send a notice of electronic filing to the interested parties.

s/ Gabrielle Bruckner
Gabrielle Bruckner